STATE OF MICHIGAN

COURT OF APPEALS

COMERICA BANK, successor to COMERICA BANK-JACKSON, N.A.,

Plaintiff-Appellee,

v

EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES and TOM D. JOHNSON,

Defendants-Appellants.

UNPUBLISHED
May 26, 2000

No. 213977
Jackson Circuit Court
LC No. 94-068152-CK

COMERICA BANK, successor to COMERICA BANK-JACKSON, N.A.,

Plaintiff-Appellee,

v

EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES and TOM D. JOHNSON,

Defendants-Appellants.

No. 213987
Jackson Circuit Court
LC No. 94-068152-CK

Before: Smolenski, P.J., and Griffin and Neff, JJ.

PER CURIAM.

In these consolidated appeals, defendants Equitable Life Assurance (Equitable) and Tom D. Johnson appeal an August 7, 1998, order of the Jackson Circuit Court awarding plaintiff Comerica Bank (Comerica) judgment against defendant Equitable in the amount of $43,536.93 plus interest for commission renewal payments owed pursuant to a perfected security interest. We affirm.

I

Defendant Johnson served as an independent insurance agent for defendant Equitable. In that capacity, he earned commissions for the sale of insurance policies and, after selling such policies, became entitled to renewal commissions on the policies. In 1985, Johnson entered into a loan transaction with plaintiff Comerica. Johnson was a guarantor of a mortgage to Comerica on the Greenwood Centre, Inc., a commercial property. As security for the loan, he gave Comerica a security interest in all accounts and general intangibles, including all of his past and future commissions with Equitable. Plaintiff perfected its security interest and has since filed several continuation statements with the Michigan Secretary of State's Office.

In 1991, Johnson suffered a disabling stroke. As a result, he terminated his agency relationship with Equitable and severed his business relationship with his partner, James Pickford. The partnership dissolution agreement provided that Johnson was to continue receiving renewal commissions he had earned as an agent with Equitable. Subsequently, Greenwood Centre, Inc., defaulted on the Comerica mortgage note and Comerica began collection proceedings pursuant to the terms of the mortgage. In January 1994, Equitable was notified by Comerica that Comerica held a security interest in Johnson's accounts receivable and that all future payments made on any insurance agreements in favor of Johnson were to be forwarded to Comerica. However, Equitable continued to pay Johnson his renewal commissions. In February 1994, Comerica filed suit in Jackson Circuit Court against defendants Johnson and Equitable (and several other insurance companies since dismissed as parties) requesting in pertinent part that all renewal commissions attributable to Johnson be turned over to Comerica.

In September 1994, defendant Johnson filed a petition for relief under Chapter 11 of the United States Bankruptcy Code, 11 USC 101 *et seq.*, with the Bankruptcy Court for the Eastern District of Michigan and, as a result, the present action was automatically stayed pursuant to 11 USC 362. Comerica responded by filing a motion for lift of stay, asking that it be allowed to continue the present collection action in the state circuit court. Following numerous hearings, the bankruptcy court, in a written opinion issued on May 29, 1996, ruled in pertinent part that Comerica did in fact hold a perfected security interest and the renewal commissions were covered by virtue of the settlement agreement dissolving the partnership between Johnson and his former partner, Pickford. The bankruptcy court further held that Comerica was entitled to a partial lift of stay to pursue the renewal commissions in state court.[1]

Upon issuance of the bankruptcy order, plaintiff sought and obtained summary disposition in the Jackson Circuit Court, which awarded Comerica an in rem judgment against defendant Johnson in the amount of Comerica's unsecured claim of $667,652. This October 10, 1996, order of the trial court further included a declaratory judgment that plaintiff, pursuant to its perfected security interest, was entitled to all renewal commissions payable by Equitable to Johnson, which Equitable was ordered to account for on an annual basis.[2] *No appeal was taken from the October 10, 1996, judgment*.

Following further proceedings in the bankruptcy court, plaintiff returned to the Jackson Circuit Court with a renewed motion for summary disposition, seeking to enforce payment by Equitable of renewal commissions to satisfy the October 10, 1996, judgment. On August 7, 1998, the trial court entered a judgment against defendant Equitable in the amount of $43,536.93, together with interest. The judgment was in the nature of an accounting of the earlier October 1996 order, for Johnson's accrued renewal commissions previously declared owing from Equitable to plaintiff. Defendants Johnson and Equitable now appeal from the August 7, 1998, order of the trial court.

II

As a preliminary matter, we note that on appeal both defendants Johnson and Equitable challenge various aspects of the August 7, 1998, order of the trial court. However, as defendant Johnson acknowledges in his brief on appeal, the motion for summary disposition giving rise to the August 8, 1998, judgment was not directed to him; rather, the relief requested by and granted to plaintiff pertained only to Equitable, the payor of the renewal commissions, and judgment was in fact rendered only against Equitable. Consequently, Johnson does not have standing to challenge the August 7, 1998, judgment entered against Equitable. As previously explained by our Court in *Health Central v Comm'r of Ins*, 152 Mich App 336, 347-348; 393 NW2d 625 (1986):

> To have standing, a party must show a direct effect to his legal interest. *Human Rights Party v Michigan Corrections Comm*, 76 Mich App 204, 213; 256 NW2d 439 (1977), lv den 402 Mich 906 (1978). A wrong to one gives no right of action to another whom it incidentally injures, *S C Hall Lumber CO v Gustin*, 54 Mich 624, 632; 20 NW 616 (1884), and the incidentally injured one cannot sue on behalf of those whose rights they assert. *Mercer v Michigan State Bd of Ed*, 379 F Supp 580, 584 (ED Mich, 1974), aff'd 419 US 1081; 95 S Ct 673; 42 L Ed 2d Ed 2d 678 (1974).

Four out of the five appellate claims of the remaining defendant, Equitable, center on issues surrounding the enforceability of Comerica's security agreement and the binding effect of the accompanying financing statement. Specifically, Equitable argues that although Comerica sent notice that all payments covered by the security agreement must be forwarded to it, because Comerica did not precisely identify the scope of its security interest until after a judicial determination on this issue, the initial notice was inadequate and Equitable had no legal obligation to pay these sums. Equitable further maintains Comerica's security interest did not attach to social security (FICA) payments withheld by Equitable from the commissions paid to Johnson and remitted to the Internal Revenue Service. Defendant also alleges that its liability is limited to payments made between January 13, 1994 (the date Equitable received notice from Comerica regarding its security interest), and August 31, 1994 (the last day Johnson spent outside the protection of the bankruptcy court), and it is entitled to offset future payments owing to the debtor.

In response, plaintiff Comerica argues that the doctrine of collateral estoppel[3] applies and prohibits Equitable from re-litigating the above issues, already decided in final adjudications by the federal bankruptcy court and the state circuit court, on appeal. We agree.

In *People v Gates*, 434 Mich 146, 154-155; 452 NW2d 627 (1990), our Supreme Court described collateral estoppel in the following manner:

> Collateral estoppel precludes relitigation of an issue in a subsequent, different cause of action between the same parties where the prior proceeding culminated in a valid, final judgment and the issue was (1) actually litigated, and (2) necessarily determined. *Jacobson v Miller*, 41 Mich 90, 93; 1 NW 1013 (1879); *Howell v Vito's Trucking & Excavating Co*, 386 Mich 37, 42; 191 NW2d 313 (1971); Restatement Judgments, §68, p 293. 1 Restatement Judgments, 2d, §27, p 250. [Footnotes omitted.]

See also *Porter v Royal Oak*, 214 Mich App 478, 485; 542 NW2d 905 (1995); *Eaton Co Bd of Rd Comm'rs v Schultz*, 205 Mich App 371, 376-377; 521 NW2d 847 (1994); *People v Ward*, 133 Mich App 344, 352-353; 351 NW2d 208 (1984).

"A judgment is considered a determination of the merits, and thereby triggers the doctrine of collateral estoppel on relitigation, even if the action has been resolved by a summary disposition. . . ." *Detroit v Qualls*, 434 Mich 340, 356, n 27; 454 NW2d 374 (1990).

In the instant case, the four issues raised on appeal by defendant Equitable regarding the enforceability of Comerica's security agreement and financing statement were actually litigated and necessarily determined with finality in prior proceedings. The bankruptcy judge found "Comerica possesses a perfected lien against the commission renewals being paid to the debtor," and "[b]y reason of Comerica's perfected lien, the stay is lifted . . . and Comerica may proceed with its Jackson Circuit Court action as previously submitted and enforce the contractual rights and security agreements, it possesses."[4] Thereafter, as previously noted, the circuit court in its October 1996 order confirmed fully the judgment of the bankruptcy court relative to the entitlements held by plaintiff to all renewal commissions being paid by defendant Equitable to Johnson and entered an in rem judgment against codefendant Johnson in the full amount of the unsecured claim of $667,652. Further, the trial court held the contract rights being paid by defendant Equitable to Johnson were not wages and no W-2 would be generated to Johnson for those sums. In sum, the circuit court held the security agreement and financing statements were fully effective and binding between the parties with regard to the renewal commissions. Significant to the issue of collateral estoppel, no appeal was taken by either Equitable or Johnson from the October 10, 1996, judgment, which therefore became a final adjudication with respect to the issues of the viability of the security agreement and financing statement. The August 7, 1998, order of the trial court from which Equitable presently appeals is an accounting of the earlier judgment and merely reinforces plaintiff's previously established rights to the renewal commissions. Consequently, while it would have been appropriate for defendant to raise the present issues in a challenge to the October 1996 judgment, which addressed and disposed of plaintiff's entitlements pursuant to its perfected security interest, Equitable's failure to do so precludes a collateral attack on the August 1998 judgment, which did no more than direct payment of renewal commissions by Equitable to Comerica *"consistent with prior expressed Order of this [circuit] court."* We therefore conclude defendant is barred from now raising these issues on appeal. *Ward, supra*.

III

The sole remaining issue on appeal not within the preclusive scope of collateral estoppel is whether the trial court erred in awarding interest on the judgment at the rate of twelve percent per annum pursuant to MCL 600.6013(5); MSA 27A.6013(5). Defendant Equitable argues the statutory twelve percent interest for written instruments is inapplicable under the circumstances, because the judgment entered against it was not "rendered on a written instrument" within the meaning of the statute. Equitable maintains there was no preexisting written contractual relationship between plaintiff and defendant; Comerica's claim is one for conversion arising out of Equitable's failure to make payments to it that were covered by its security interest. Defendant Equitable argues neither the written demand notice from Comerica nor the written documents between Equitable and codefendant Johnson bring into existence a written contractual relationship sufficient to invoke subsection (5) of the prejudgment interest statute. We disagree with defendant's characterization of the underlying basis of this cause of action.

MCL 600.6013; MSA 27A.6013 provides in pertinent part:

> (5) For complaints filed on or after January 1, 1987, if a judgment is rendered on a written instrument, interest shall be calculated from the date of filing the complaint to the date of satisfaction of the judgment at the rate of 12% per year, compounded annually, unless the instrument has a higher rate of interest. In that case, interest shall be calculated at the rate specified in the instrument if the rate was legal at the time the instrument was executed. The rate shall not exceed 13% per year compounded annually after the date judgment is entered.
>
> (6) Except as otherwise provided in subsection (5) . . ., for complaints filed on or after January 1, 1987, interest on a money judgment recovered in a civil action shall be calculated at 6-month intervals from the date of filing the complaint at a rate of interest that is equal to 1% plus the average interest rate paid at auctions of 5-year United States treasury notes during the 6 months immediately preceding July 1 and January 1, as certified by the state treasurer, and compounded annually, pursuant to this section.

The imposition of statutory interest is mandatory, MCL 600.6013(1); MSA 27A.6013(1). The prejudgment interest statute "is remedial in nature and is to be construed liberally in favor of the plaintiff." *Phinney v Perlmutter*, 222 Mich App 513, 541; 564 NW2d 532 (1997). In *Yaldo v North Pointe Ins Co*, 457 Mich 341; 578 NW2d 274 (1998), our Supreme Court liberally construed MCL 600.6013(5); MSA 27A.6013(5) in the context of a suit by an insurer on his written insurance contract. The *Yaldo* Court, *supra* at 346, 350, explained:

> We note that the Legislature did not define the term "written instrument" when it enacted MCL 600.6013; MSA 27A.6013. Nevertheless, we find the expression clear and unambiguous. An insurance policy is a written instrument. We refuse to rewrite the language of the statute effectively to limit "written instrument" to "negotiable instrument." The expression "negotiable instrument" is well known and is used

> throughout the Uniform Commercial Code. Had the Legislature intended to restrict the applicability of subsection 5 to negotiable instruments or instruments containing a rate of interest, it could easily have used such terminology.
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> * * *
>
> The purpose of MCL 600.6013; MSA 27A.6013 is to compensate the claimant for delays in recovering money damages. . . . The Legislature's choice to impose a higher rate of interest on defendants who enter into written contracts is not arbitrary. First, there is a distinction between contract claims and tort claims. Tort claimants often do not have a preexisting relationship with their tortfeasors. On the other hand, there is a preexisting relationship between two parties who have signed a written contract. Greater expectations regarding performance and payments are likely to exist when the parties have established their rights and responsibilities before a controversy arises.

In *Jones v Jackson National Life Ins Co,* 819 F Supp 1382, 1384 (WD Mich, 1993), a breach of insurance contract action, the United States district court likewise construed Michigan's prejudgment interest statute in a broad manner:

> Jackson National argues that "written instrument" refers to debt instruments and other negotiable paper bearing an interest rate, not just any written contract. The life insurance policy here enforced is said not to be such a written instrument.
>
> Jackson National may be correct in arguing that not all written contracts are written instruments for purposes of MCL 600.6013(5). In all other respects, the argument is unpersuasive. Jackson National cites no clear authority for its proffered restrictive definition of "written instrument." In *Miszewski v Knauf Construction, Inc*, 183 Mich App 312; 454 NW2d 253 (1990), the court applied subsection (6) of the prejudgment interest statute, rather than subsection (5), in awarding interest in connection with a judgment in a contract dispute. There is no indication in *Miszewski*, however, whether a written contract was enforced and whether it called for payment of a sum certain. *Miszewski* hardly represents a sufficient basis for departing from the general rule that statutory language is to be given its plain and ordinary meaning. *Miller v Irwin*, 190 Mich App 610, 613; 476 NW2d 632 (1991).
>
> *Where, as here, the judgment rendered has the effect of enforcing a written promise to pay a sum certain, judgment must be deemed to have been rendered on a written instrument.* This conclusion is consistent with recognition that "MCL 600.6013 is a remedial statute which is to be liberally construed to give effect to its intent and purposes." *Gordon Sel-way* [*Inc v Spence Brothers, Inc*, 438 Mich 488; 475 NW2d 704 (1991)], *supra*, 438 Mich at 510; 475 NW2d 704. [Emphasis added.]

Unquestionably, the basis for the judgment herein is a "written instrument," albeit more complicated in its origins and effects than the *Yaldo* and *Jones* insurance contracts set forth above. This suit is derived from the fact defendant Johnson guaranteed, in writing, a mortgage to Comerica and, as security for the loan, gave Comerica a security interest in all accounts and general intangibles, which by virtue of Johnson's settlement agreement with his partner, Pickford, included all of his past and future renewal commissions payable by defendant Equitable. Although the present pursuit of these funds by plaintiff may be in the nature of a conversion action against defendant Equitable, which had no direct written contractual relationship with Comerica, legal entitlement to the funds nonetheless stems from judgment rendered on a written instrument – Comerica's mortgage and perfected security interest. Because "the judgment rendered has the effect of enforcing a written promise to pay a sum certain," *Jones, supra* at 1384, the "judgment must be deemed to have been rendered on a written instrument" within the meaning of subsection (5) of the prejudgment interest statute. *Id*.

We therefore conclude the trial court did not err in awarding interest on the judgment at the rate of twelve percent per annum pursuant to MCL 600.6013(5); MSA 27A.6013(5).

Affirmed.

/s/ Michael R. Smolenski
/s/ Richard Allen Griffin
/s/ Janet T. Neff

[1] In its written opinion dated May 29, 1996, the bankruptcy court held in pertinent part:

> A security agreement was executed by the debtor on July 31, 1985, granting to Comerica, a security interest in the debtor's accounts receivable general intangibles and contract rights. At all relevant times, the debtor has remained continuously indebted to Comerica.
>
> * * *
>
> The commission renewals do not fit into any category of income, asset funds or monies that are accorded protection under Michigan or Federal law. The commission renewals result from extensive negotiations between the debtor's former partner and debtor upon the dissolution of an agency partnership between the debtor and his former partner James Pickford.
>
> The Settlement was essentially an agreement to dissolve the partnership. Division of the business provides as follows:
>
> "Equitable Commissions: The right to commissions on any individual life insurance or individual annuity contract renewals placed with the Equitable and its subsidiaries and any successor of any of them . . . in Johnson's name shall belong to

Johnson for a period of twenty (20) years from the date of the first payment under this paragraph."

* * *

Therefore the commission renewals under the Settlement Agreement are essentially contract rights. Accordingly, Comerica possesses a perfected lien against the commission renewals being paid to the debtor.

* * *

. . . Comerica's motion to lift stay is partially granted in accordance with 11 USC 362(d). It is hereby determined that Comerica's claim is not adequately protected as the secured collateral has declined in value. Further, the stay should be terminated because the debtor has no equity in the property based upon the indebtedness owing and the property is not necessary for an effective reorganization. There is nothing to reorganize.

The stay is also terminated as to the commission renewals pursuant to the Settlement Agreement between debtor and James Pickford. By reason of Comerica's perfected lien, the stay is lifted as delineated above and Comerica may proceed with its Jackson County Circuit Court action as previously submitted and enforce the contractual rights and security agreements, it possesses.

[2] The October 10, 1996, order of the trial court states in pertinent part:

The Plaintiff's Motion for Summary Disposition be and the same hereby is GRANTED. The Plaintiff is hereby awarded Judgment in rem only as to all collateral held by Comerica Bank pursuant to the Lift of Stay issued by the Honorable Ray Reynolds Graves under date of May 29, 1996, and against Tom D. Johnson in the amount of their unsecured claim of Six-Hundred Sixty-seven Thousand Six Hundred Fifty-Two ($667,652) Dollars. The Court shall retain jurisdiction over this Judgment.

The Court does further Order that sums being paid by Equitable Life Assurance Society ("The Equitable") as commission renewals and expirations and all sums being paid to or for the benefit of Tom D. Johnson in the form of commissions . . . shall be paid direct to the Plaintiff by The Equitable and shall be the property of the Plaintiff. No withholdings shall be made out of the sums payable to the Plaintiff by The Equitable. All sums so received by the Plaintiff shall be applied directly against the in rem Judgment outstanding . . . It is the finding of this Court that the Plaintiff holds and shall continue to hold a perfected security interest in all contract rights, general intangibles and accounts receivables of Defendant, Tom D. Johnson entitling the Plaintiff to receive all The

Equitable Contract Rights payments to which Tom D. Johnson may become entitled from January 6, 1994, to present from The Equitable.

IT IS FURTHER ORDERED that all rights held by the Plaintiff against The Equitable are hereby preserved together with discovery rights against The Equitable for sums paid and sums owing to the Defendant, Tom D. Johnson from January 6, 1994, to present as payments on The Equitable Contract Rights. All sums withheld or payable by The Equitable to Tom D. Johnson and withheld from the date of Judge Graves' Finding, as part of The Equitable Contract Rights shall be forthwith released and payable to the Plaintiff as shall all future accruing sums payable as The Equitable Contract Rights. Plaintiff shall have the reserved right to demand, subject to defense by The Equitable, if any, Judgment for conversion against The Equitable once full accountings and payments have been released to The Plaintiff by The Equitable and a sum certain is determined on The Equitable Contract Rights owing by The Equitable.

The Equitable shall fully account to this Court, Tom D. Johnson, and Plaintiff for all The Equitable Contract Rights payments to which Tom D. Johnson is entitled from January 6, 1994, to present within thirty (30) days of entry of this Judgment. This Court finds that The Equitable Contract Rights are not wages and The Equitable shall not generate a W-2 as to these sums.

THE COURT FURTHER FINDS that there is no reason for delay and this Judgment is a final Judgment as to the matters fully addressed herein.

[3] The doctrine of collateral estoppel is less precisely referred to by plaintiff in its appellate brief as res judicata. The term "res judicata" generally refers to claims preclusion, which covers the preclusive effect of a judgment on a subsequent proceeding on the basis of the same cause of action. Collateral estoppel refers to issue preclusion. *People v Gates*, 434 Mich 146, 154, n 7; 452 NW2d 627 (1990).

[4] While other elements of the bankruptcy court's ruling were appealed to the federal appellate court, plaintiff's right to pursue the proceeds attributable to Johnson's renewal commissions in accordance with its security agreement was not challenged.